92-1808

No.

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272

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ISSUES PRESENTED

1. That the decision by federal social security administrative law judge *that a party is totally disabled* is binding on the federal courts and consequently the disability must be considered by the courts.

2. That the simple denying and ignoring of established court emergency procedures *in a life-threatening medical emergency* is a violation of due process, equal protection of the law and access to the courts.

3. That the urgent emergency medical care for a party, as supported by sworn physician affidavits, cannot be delayed or denied by a court *without a timely hearing*.

4. That only six days to file a full appeal brief on the merits by a non-attorney pro se plaintiff *who has not violated any rules or been admonished* and is in need of critical emergency exploratory and corrective surgery, is a violation of due process, equal protection of the law and access to the courts.

5. That a cause and an appeal cannot be dismissed by a court where the party was denied urgent medical care *despite support by physicians' sworn affidavits, and such denial of medical care caused him to become legally disabled and led to a dismissal, with no relative hearing held.*

6. That reasonably documented legal disability protects plaintiffs from unconstitutional deprivations, and must be heard, considered or opposed in full due process by the courts.

7. That the the health consequences of the denial of such medical care and the resulting alleged but unsupported by the record procedural lapses while seriously ill and legally disabled do not under the circumstances constitute *'dilatory conduct, contumaciousness, misconduct, neglect, unnecessary requests for time for health and briefing, belligerence, glacial movement, refusal to cooperate, unused chances to comply, stonewalling, aging motions, no justification, failure to attend or cooperate,'* and represent a denial of due process.

8. That the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois cannot violate their stated procedures for concurrent appeals and FRCP 60(b) proceedings to destroy plaintiffs' cause and appeal.

LIST OF PARTIES

The parties are the same as those listed in the caption of this petition.

PETITIONERS

Frank L Whitmer and Joan P Whitmer are party-plaintiffs, non-attorneys pro se, private citizens representing themselves in a civil case.

Petitioners are individuals, citizens and residents of the Northern District of Illinois, Western Division, County of DeKalb and the State of Illinois. They are also owners of condominium unit 8504 in the John Hancock Center, 175 East Delaware Place (residential address), Chicago, Illinois.

Mr Whitmer was elected a member of its Board of Directors, additionally of its Executive Committee, and was also appointed Chairman of the Engineering Committee for the Condominium Association.

Employees, officers, and members of the Association complained to him about ventilation health and safety code violations. He investigated and opposed the violations. As a result, the City of Chicago prosecuted certain violations and won a trial on the merits, as well as additional agreed orders.

He was the Executive Director of a specialized, certifying international, national and local bar association for fifteen years. He was a participant in the American Bar Association *"Arden House Conferences."* He is a former management employee with American Law Reports.

Petitioner Frank L Whitmer has been adjudged seriously impaired with atrial disease, hypertension, severe sleep apnea, nasal obstruction, diabetes or stress hyperglycemia, and aggravation by toxic pollutants during and following his residence in the John Hancock Center, and has consequently been under total disability as adjudged by a federal social

security administrative law judge. His disability ajudication requires that he avoid precipating toxic exposures that will further activate these disabilities and their consequences.

LIST OF PARTIES

RESPONDENTS

John Hancock Mutual Life Insurance Co., Skidmore, Owings And Merrill, Sudler And Co., Sudler Marling, Inc., Tishman Construction Co., Aluminum Company of America, Admiral Heating and Ventilating, Inc., R B Hayward Co., Universal Sheet Metal Corp. d/b/a Universal-Hayward, Cupples Products Corporation, a Division of H H Robertson Co., H H Robertson Co., 175 East Delaware Place Homeowners Association, H S Nachman and Associates, Inc., Environmental Systems Design, Inc., L C Kohlman, Inc., General Parking Corporation, Wilson & McIlvaine, City of Chicago, and Does 1-50 Inclusive.

The respondents are companies, partnerships, corporations, a municipality, a homeowners association and a law firm.

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28 USC 1404(a) 18

29 USC 794, § 706(8)(B) 19
Rehabilitation Act of 1973

42 USC section 405(g) (1982)

OTHER AUTHORITIES

Practitioner's Handbook for Appeals to the United

References to the record are:
A = Appendix page number
WD = Western Division docket,
ED = Eastern Division docket.

Petitioners Frank L and Joan P Whitmer respectfully ask that a writ of certiorari issue to review certain orders of the United States Court of Appeals and the United States District Court, Northern District of Illinois, western and eastern divisions.

Petitioners ask this Court to exercise its power of supervision. Alternatively, the Court should reverse summarily and remand with supervision to the court below, and require the district court to proceed in accordance with the law, for full hearing on the merits of the complaint with a proper case and trial.

The orders to be reviewed include United States Court of Appeals orders of December 16, 1992 affirming the decision of the federal district court (A1), February 9, 1993 denial of petition for rehearing with suggestion for rehearing in banc (A6), June 7, May 10, May 2, April 25, (2), March 15, and January 25, 1991 December 20, 1990 and all other preceding, now effectively final orders in the circuit or district courts in that they led to these orders are sought to be reviewed.

In addition, certain orders of the Northern District of Illinois, Western Division, entered on April 12, 1989, October 2, and October 26, 1989, and of the Eastern Division entered on June 14-15.

Also the order of June 27, 1990 by the federal district court, eastern division, dismissing this cause for want of prosecution with prejudice as Petitioners did not appear for a status hearing. All other preceding, now effectively final orders, in that they led to this order are sought to be reviewed.

OPINIONS BELOW

The orders are not reported, certain ones are reproduced in the appendix.

JURISDICTION and STATUTE INVOLVED

The order of the United States Court of Appeals for the Seventh Circuit entered on December 16, 1992 dismissed the appeal. (A1) The court of appeals denied the petition for rehearing on February 9, 1991. (A6) No extension of time to file this petition for writ of certiorari has been requested.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under:

28 USC § 1254(1) Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioners' Federal Complaint

The merits of the case have never been considered, there has been no trial on the merits, and petitioners have had no discovery whatsoever.

Petitioners use the extended term *"defendants"* under the concept of conspiracy, as petitioners have pled a continuing conspiracy in their complaint.

Plaintiffs brought this suit in the Northern District of Illinois, Western Division, invoking federal jurisdiction under the venue statutes and:

the CONSTITUTION OF THE UNITED STATES, particularly the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Thirteenth, and Fourteenth Amendments,

the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. section 1961 et. seq., particularly 1964(a),(c), and 1965(a),(b),(c),(d),
the CIVIL RIGHTS ACT, 42 U.S.C. section 1983 et. seq., particularly 1985(3), and 28 U.S.C. sections 1331, 1337, 1339, 1343, 1355, 1357, 1391 and 1395.

Additionally, Defendants have deprived Plaintiffs of their rights, privileges and immunities under the CONSTITUTION OF THE STATE OF ILLINOIS, particularly Articles Six and Eleven and the Bill of Rights sections One, Two, Four, Twelve, Thirteen, Fifteen, Twenty-Three and Twenty-Four, and the STATUTES OF THE STATE OF ILLINOIS, and the MUNICIPAL CODE OF CHICAGO.

The district court had jurisdiction over the remaining non-federal counts as related pendent claims under State statutory and common law.

ARGUMENT and REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT DID NOT RULE ON THE MAIN ISSUES RAISED IN PLAINTIFFS' BRIEFS

Neither the federal district court and the United States Court of Appeals for the Seventh Circuit followed their FRCP 60(b) and concurrent appeal procedures as in the Seventh Circuit *Practitioner's Handbook.* They ignored their 60(b) ***"inclination"*** procedures and plaintiffs' 60(b) ***"inclination"*** motion. (Whitmers' brief at 12-14, 20-27, 40.) Plaintiffs followed these rules to no avail.

Both courts unconstitutionally denied totally disabled plaintiff Frank L Whitmer emergency medical care (including emergency exploratory and corrective surgery for four or more life-threatening gastrointestinal perforations, as advised by the Mayo Clinic). All this was supported by plaintiff's physicians' sworn affidavits.

Plaintiff's *'series of motions for extensions of time'* were when occurred when he was seriously and dangerously ill and still asking that the courts rule on the *"inclination"* proceeding.

Because of the denial of his established and constitutional right to emergency procedures, and to life itself, he soon became legally disabled as well, prior to the dismissals in the district court and court of appeals. In no way can that be *'stonewalling.'*

THE SEVENTH CIRCUIT ORDER WENT BEYOND THE BOUNDS OF THE APPEAL AND THE RECORD IS ESSENTIAL TO PROTECT PLAINTIFF-APPELLANTS' RIGHTS IN THIS PETITION FOR A WRIT OF CERTIORARI TO THE ONLY COURT AVAILABLE TO THEM IN THIS GROSS MISCARRIAGE OF JUSTICE.

In *Marbury v Madison* [5 US (1 Cranch)] 137, at 163 (February 1803) Justice Marshall for the United States Courts set the constitutional limits for the courts, the legislature, and the executive branch as to the protections of the constitution for each American citizen stating as follows:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

"This is the Supreme Court, and by reason of its supremacy must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial." at 143.

"If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man." at 152.

"The government of the United States has emphatically termed a government of laws, and not of men." at 162.

The record does not support the defendants' and the Seventh Circuit's contention as to why the trial court dismissed this case. However, in a case of this type, it is of vital necessity that this Supreme Court of the United States call up the record for this petition for a writ of certiorari. No thirty page petition could possibly present the facts. Only the record and a brief can do so.

BOTH TRIAL COURT AND COURT OF APPEALS VIOLATED ESTABLISHED 60(b) PROCEDURES THAT PLAINTIFFS FOLLOWED

Denial of meaningful due process to adjudicated totally and legally disabled, handicapped pro se plaintiffs is a massive violation of any concept of due process, equal protection, or access to the courts.

July 27, 1990 Thirty (30) 30 days after the entry of the order of dismissal while plaintiff Frank L Whitmer had physically collapsed and his physicians' sworn affidavits said he was unable to proceed competently, plaintiffs filed their timely *"Emergency Verified Motion for Relief from Order, Vacate and Reinstate Cause"* seeking relief under Rule 60(b) and common law, supported by three sworn medical affidavits and a radiologist's report. (ED 78) Plaintiffs 60(b) *"Emergency Verified Motion"* required due process, hearing, and an order.

Aug 3, 1990 Plaintiffs' motion to vacate dismissal and to reinstate was referred to Magistrate W Thomas Rosemond Jr for his report and recommendation. (ED 81) A briefing schedule was set, with plaintiffs' rely due August 30, 1990.

August 24, 1990 Plaintiffs joint notice of appeal was filed. (ED 88). It was docketed on August 28, 1990 as appeal 90-2888 in the United States Court of Appeals for the Seventh Circuit.

Defendants Moved For Dismissal Of Appeal 90-2888, Falsely Claiming The Order Was Not Final

February 8, 1991. Prior to filing of the brief, in early February, 1991, defendants asked to stay the briefing on the merits pending resolution of the jurisdictional issues, and also moved to dismiss. However, their motions were false and misrepresented the jurisdictional matter completely. The court

moved immediately on defendants' motions to stay the proceedings by granting it the same day it was filed.

March 15, 1991 Following the defendants' motions to dismiss, the court did not give plaintiffs their request to refute defendants' false motions. Instead, the appeal was improperly dismissed for lack of jurisdiction. (A15)

March 29, 1991. Plaintiffs-appellants filed a timely Petition for Rehearing stating defendants' falsities. Twenty-seven days later on **April 25, 1991**, plaintiffs' petition for rehearing was granted and the order of dismissal was vacated. (A12) However, apparently punitively plaintiffs-appellants were ordered to file their brief on the merits in only six working days on May 3, 1991. This was the same day that Mrs Whitmer had told the court previously that her Petition for Writ of Certiorari to the Supreme Court was due even though she had had asked the court of appeals to not schedule anything on that date. The Court of Appeals ignored her two requests creatubg a conflict in filing that no pro se could do.

Also, even though the court of appeals was then advised of the pending Rule 60(b) *"inclination"* motion in the district court, the appeal was dismissed *"for want of prosecution"* on May 10, 1991. (A9)

The court of appeals didn't care about its own procedures.

May 1, 1991 Meanwhile in the federal district court, a briefing schedule was set for defendants to file answers to plaintiffs' motion for statement or memorandum of the court's inclination to grant FRCP 60(b) relief. Certain defendants responded, others did not, and some improperly filed after their due date.

May 24, 1991 Plaintiffs' objected to new filings by defendants. Plaintiffs objected to anything being presented to the federal district court until it had ruled on plaintiffs' request for a statement or memorandum of the court's inclination to grant FRCP 60(b) relief. (ED 106)

June 19, 1991 In Plaintiffs' reply, a request was made for a statement or memorandum of this court's *'inclination'* to grant their Rule 60(b) motion, pursuant to FRAP and local circuit procedures. (ED 113)

The court was told that no briefing schedule had been set for plaintiffs' FRCP 60(b) Motion, Response, and Reply.

Despite the lack of a briefing schedule for that motion, certain defendants prematurely filed a response. Plaintiffs objected that defendants' motion should not be considered until plaintiffs' had an opportunity to reply, and that the court not consider any premature responses by defendants.

The importance of this request was such that plaintiffs asked that it be fully briefed and fully heard, with oral argument. Because of plaintiff Frank L Whitmer's seriously deteriorated health, additional time was requested for plaintiffs' replies.

Additionally, plaintiffs offered substantial medical data relating to plaintiff Frank L Whitmer's documented medical collapse during the period of the 'dismissal.'

July 2, 1991 Plaintiff's Motion for a Declaration of Status of the Case. (ED 118)

July 2, 1991 The Federal District Court, over plaintiffs' objections, without giving plaintiffs an opportunity to respond to defendants' premature responses, ordered *"Plaintiffs' motion for Rule 60(b) relief is DENIED."*

July 17, 1991 Plaintiffs filed their timely motion in federal district court to *"Reconsider Court's Denial of Their FRCP 60(b) Motion"*. This motion was supported by multiple medical affidavits of William K Lee, MD., and T G Randolph, MD. (ED 120) detailing the four documented gastrointestinal episodes and perforations of June 15, June 30, September 22, and November 27, 1990. Sanctions against the defendants for false pleading were pled by plaintiffs.

July 25, 1991 the federal district court ordered:

"Plaintiff's motion to reconsider court's denial of their FRCP 60(b) motion and for sanctions against certain defendants is denied."

Aug 8, 1991 Plaintiffs' Circuit Rule 3(c) Jurisdictional Statement timely filed. No defendant opposed this statement.

Plaintiffs rights and privileges of their filing under Rule 60(b) were prejudicially violated. Plaintiffs were not able to proceed earlier with these Rule 60(b) procedures while both the defendants-appellees and that court were contending plaintiffs-appellants had not filed a Rule 60(b) motion.

This was the subject of Plaintiffs' first petition for rehearing. The Seventh Circuit had dismissed appeal 90-2888 for lack of jurisdiction, based on defendants false pleading where they ignored completely that plaintiffs had filed a Rule 60(b) motion which did not destroy their appeal.

The Seventh Circuit subsequently vacated the order dismissing the appeal and reinstated it.

Plaintiffs-Appellants Properly Sought District Court's "Inclination"

April 29, 1991 in the Seventh Circuit, plaintiffs filed their Emergency Motion to Vacate or Modify Portions of April 25, 1991 Order and for a FRCP 60(b) 'Brief Postponement' Under This Circuit's *'Established Procedures.'*

Defendants violated District Court Order Asking Only For Answers To Plaintiffs' Motion For "Inclination" Not a Response To a Rule 60(b) Motion.

On May 1, 1991 (ED 95), in regard to *"Plaintiffs' Motion For Statement Or Memorandum Of The Court's Inclination To Grant FRCP 60(b) Relief In Cause Now Under Appeal 90-2888 With Seventh Circuit,"* plaintiffs requested that under the Seventh Circuit local rules, the federal district court issue a statement or memorandum of its intention to grant FRCP 60(b) relief.

On **May 1, 1991** (ED 95) Judge Bua ordered that:

"Defendants are directed to file an answer to plaintiffs' motion for statement or memorandum of the court's inclination to grant FRCP 60(b) relief by May 21, 1991, and plaintiffs to file a reply June 4, 1991.

Contrary to the court's order, on May 16, 1991 defendant SKIDMORE OWINGS & MERRILL filed a response (ED 96) to plaintiffs' Rule 60(b) motion, **instead of** the answer to plaintiffs' "*motion for statement or memorandum of the court's inclination*" on May 21, 1991 as directed.

On **May 20, 1991** defendants JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SUDLER-MARLING INC and GENERAL PARKING filed their answer (ED 98) as directed by the court to plaintiffs' motion for the trial court's inclination.

However, again contrary to the court's order, on May 20, 1991 defendants JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SUDLER-MARLING INC and GENERAL PARKING filed a response (ED 99) to plaintiffs' Rule 60(b) motion, **in addition to** their answer to plaintiffs' "*motion for statement or memorandum of the court's inclination.*" As defendants 175 East Delaware Place Homeowners Association (ED 100), Cupples/H H Robertson (ED 105), Burke Wilson & McIlvaine (ED 109) and R B Hayward (ED 111) also moved to adopt both the answers and the improper responses.

On **May 21, 1991** defendant City of Chicago filed its answer (ED 101) as directed by the court to plaintiffs' motion for the trial court's inclination. Six other defendants didn't even bother to answer.

Therefore, there were no valid responses before the trial court, only "*inclinations.*"

Fundamentally, defendants in their answer as presented (and adopted by other defendants) only talked about the filings in

the United States Court of Appeals for the Seventh Circuit and defendants' wishes if plaintiffs' case was reinstated and the order of dismissal vacated. That, however, had nothing whatsoever to do with the federal district court's *"inclination"* as to the FRCP 60(b) motion).

Plaintiffs-Appellants Followed FRCP 60(b) "Inclination" Procedures"

Plaintiffs-Appellants asked the Seventh Circuit for a *"brief postponement."* The order on May 2, 1991 by Judge Frank H Easterbrook denied this request, in violation of the circuit's own established procedures. (A11)

The required May 3, 1991 date resulted in prejudicial conflict in filing with a petition for certiorari in the Supreme Court of the United States the same day.
Plaintiffs-Appellants were therefore prejudicially

a. unable to file their brief on merits in appeal 90-2888
b. were forced into another appeal, 91-2805
c. were denied the protections of 60(b)

However, because of the joint prejudicial effect by both the district court and court of appeals, Plaintiffs-Appellants claim the right to not be limited to only the denial of their Rule 60(b) motion, but claim the right to open all orders leading up to it. To do less is a massive violation of procedural due process. The cases following further support Plaintiffs' position.

The court's citation to *11 Wright & Miller, Federal Practice and Procedure § 2873* 'Effect of Appeal on Power of District Court' at 263-265 (1973) deals extensively with the FRCP 60(b) procedure that the United States Court of Appeals for the Seventh Circuit has adopted:

"Other cases have developed a different and more satisfactory procedure. They hold that during the pendency of any appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, application then can be

made to the appellate court for a remand. This procedure is sound in theory and preferable in practice."

The 1990 pocket parts to *Wright & Miller*, on page 99, further state:

"The Supreme Court now has held that the district court may entertain a Rule 60(b) motion without leave by the appellate court." *Standard Oil Co of California v U S.*, 1976, 429 US 17.

THE FEDERAL DISTRICT COURT DID NOT DISMISS THIS CASE ON THE GROUNDS CLAIMED BY THE DEFENDANTS AND THE SEVENTH CIRCUIT.

This court's order says:

"even if missing the status hearing was the result of excusable neglect, there is no justification for all of the other acts leading up to the dismissal"

There have been no unreasonable, delaying, or contumacious acts by the plaintiffs.

Judge Bua and the court staff had very few personal or mail contacts with these plaintiffs and none of the hearings or orders mention any trouble whatsoever.

Not the hearing upon transfer from Western Division on November 28, 1989,

Not the hearing status on January 24, 1990 (ED 032), nor the briefing schedule he set then,

Nor when plaintiffs provided a list of pending motions on January 2, 1990 (ED 019),

Nor whe plaintiffs filed their opposition to defendants' improper service of motions and papers, on February 12, 1990 (ED 029),

Nor when plaintiffs moved on March 14, 1990 (ED 031) for a stay and rescheduling of the health crisis with plaintiff Frank L Whitmer's severe sleep apnea, and severely obstructed breathing caused by defendants' recent carbon monoxide poisoning of him at defendants' John Hancock Center. The levels exceeded the Chicago building code maximum allowable standard.

Nor when plaintiffs' filed an emergency health response and need for discovery on April 12, 1990 (ED 040),

Nor when plaintiffs gave notice of a still missing but paid filing fee on April 16, 1990 (ED 041).

Nor when plaintiffs filed for a stay pending resolution of their petition for certiorari with the Supreme Court of the United States on April 23, 1990 (ED 043).

Nor when plaintiffs made emergency objections to a conflict in dates with their filing of that petition for certiorari on June 15, 1990. (ED 050).

This minimal contact of only three hearings and eight filings in seven months with the district judge resulted in not a single mention of any transgressions by the plaintiffs.

There was only one health motion, — and even though it was an emergency, the court did not act on it for three months.

Judge Bua never made such charges. He was perfectly capable of saying anything he wished, and he didn't do so.

Only One Reason was given by Judge Bua, orally or in writing, for the dismissal of this case:

Plaintiffs failed to appear.
Order cause dismissed for want of prosecution."
(Appendix E)

Any other interpretation by either this court of appeals or by the defendants as to why this case was dismissed by Judge Bua is sheer unsupported speculation. *Plaintiffs failed to appear. Order cause dismissed for want of prosecution"* is the only reason. The record does not support any such speculation or claim by any judge or magistrate. The record fails to support any claim of misconduct by these plaintiffs which warrant dismissal of their case.

This court's order says: *"after much procedural wrangling."* appendix B, page 2, paragraph 1.)

Plaintiffs filed their suits under the district venue provisions of the Racketeer Influenced and Corrupt Organizations Act, *"RICO."*

Plaintiff's health no longer permitted him to appear regularly in Chicago.

But Judge Roszkowski disagreed with plaintiffs' venue on April 20, 1988 (WD 126, page 5):

"I think the first thing that has to be passed, though, is the question of venue because, as I look at it on the face of it, it appears to me that this is not the proper venue in this case."

Defendant John Hancock Mutual Life Insurance Company accused plaintiffs of harassing them on March 15, 1988 (WD 082, pages 2, 5) in Hancock's motion to transfer venue:

"Venue for this action is proper in the Eastern Division of the Northern District of Illinois . . . one can only conclude that the plaintiffs' choice of forum in Rockford for this uniquely 'Chicago' case is yet another way of harassing these defendants."

So plaintiffs had to fight it out to protect their interest and a year later by Feb 23, 1989 (WD 222, pages 1, 2) defendant John Hancock Mutual Life Insurance Company switched positions.

". . . Moving defendants do not dispute that they can be sued in Rockford. . . while venue and jurisdiction is allowed in Rockford,. . . "

On February 8, 1989 (WD 214) (WD 218) plaintiffs asked for venue discovery. Defendants objected to the discovery and Judge Roszkowski refused to rule on plaintiffs' motion to compel answers. Plaintiffs have never had any venue or other discovery.

Finally, the Magistrate, on April 12, 1989 (WD 238, pages 4, 5) and the District Judge on October 2, 1989 (WD 296) similarly stated:

"Plaintiffs could have properly brought this action in either the Eastern or Western Division of the Northern District of Illinois."

They then transferred venue to Eastern Division for the defendants' convenience over plaintiffs' strong objections, ignoring plaintiff Frank L Whitmer's RICO district venue rights and his total disability, and his physicians' many affidavits advising against the transfer.

This court's order says:

"In well over two years this litigation has moved like a glacier."

"Thanks to the Whitmers' constant requests for more time."

But that is just not so. The record shows that plaintiffs Frank L and Joan P Whitmer have not been primarily responsible whatsoever for the pace of this case.

Defendants took almost four months to answer or plead to plaintiffs' amended complaint even though it was mainly the very complaint they had worked with in the state courts.

Judge Roszkowski would only rule on venue and refused to rule on discovery and the motions to dismiss. Therefore discovery was *"stayed."* Almost two years were taken up

by Judge Stanley J Roszkowski on venue and correction of the record, from April 1988 when the Whitmers' first motion for discovery was made and to January 24, 1990 when Judge Bua ordered his first briefing schedule. The defendants had even asked that Western Division rule only on venue.

Seventy-three days for a ruling promised two months earlier on *"a relatively simple question."* July 18, 1989 to Oct 2, 1989. It took Judge Roszkowski an additional 73 days to rule on plaintiffs' object to the magistrate's report and recommendation granting defendants' transfer of venue.

There was a further delay of eighty-seven days for important corrections to be made in the trial court record by Judge Roszkowski. From August 1, 1989 (WD 287) to October 26, 1989 (WD 307).

There was a four month delay/stay from October 2, 1989 to January 24, 1990 by the court's from the final transfer order to the hearing setting a briefing schedule.

There was an unconsciousnable three month delay/stay of the emergency health motion made by plaintiffs, from March 12, 1990 (ED 031) to June 12, 1990 (ED 052).

Judge Bua was not concerned about the time it might take for a stay pending his ruling on plaintiffs' motion to vacate and reinstate the dismissal of their case. August 7, 1990 hearing before Judge Bua, (docket 91-2, transcript pages 4-5):

"THE COURT: . . . I see that you do have a petition pending before the U. S. Supreme Court. Is that correct?"

"MR. WHITMER: Yes, sir." [petition 89-1984] * * *

"THE COURT: Is that petition for leave to appeal pending before the U. S. Supreme Court?"

"MR. WHITMER: Yes, sir, it is."

"THE COURT: It is. Okay. I think everything should just remain in status quo pending resolution of that question by the Supreme Court."

"MR. HARRIS: [defense counsel] Your Honor, we may be talking about another six months or something like that, you know, in this case."

"THE COURT: **So what? So what?"** (emphasis added.)

A SOCIAL SECURITY ADMINISTRATIVE LAW JUDGE HAD FOUND PETITIONER TO BE TOTALLY DISABLED

After careful consideration of the record as of July 16, 1984, an Administrative Law Judge determined in his nine page decision that:

"medical evidence supports the existence of a severe impairment . . . claimant is found to be disabled under the provisions of Title II of the Social Security Act commencing with January 1, 1983."

"It is the decision . . . claimant is entitled to . . . disability insurance benefits . . . condition . . . so severe as to not allow him to be exposed to routine work environments." (WD 213, ED 004)

The judgment of disability was reviewed and reconfirmed on Sep 30, 1987 by the Social Security Administration:

"reviewed . . . disability . . . your disability is continuing."

This determination was based upon extensive documentation, including 22 exhibits, from the Mayo Clinic, and a consulting examining physician for the Social Security Administration.

"Social Security Administration's findings of fact are conclusive if supported by substantial evidence." 42 USC section 405(g) (1982).

"The presumptions in favor of validity of judgments of a court and the jurisdiction of the court which may preclude collateral attack on such judgments may be given like effect in regard to administrative determinations."

"The decisions of an administrative body are, in the absence of evidence to the contrary, presumptively correct and valid. There is a presumption that legal duties and statutory requirements were complied with, that facts justifying a ruling were in existence, and that there was sufficient evidence on which to base the decision of the agency. So also, the action of an administrative agency, when done in the course of official duty, is generally presumed to have been done in good faith, and imports verity. Unappealed from orders must be assumed to be fair, just and reasonable, but the presumption in favor of an administrative decision is more potent with respect to finding of fact than it is with respect to a question of law." Application of Hvidsten, 72 NW2d 524, (ND).

"There is a privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." United States v Willard Tablet Co, 141 F2d 141, (CA 7 Ind); 152 ALR 1194.

REHABILITATION ACT OF 1973, 29 USC 701 ET SEQPLAINTIFFS' DISABILITIES, AMERICANS WITH DISABILITIES ACT OF 1990, (P. L. 101 Et Seq., 42 USC 1201 Et Seq)

Petitioner Frank L Whitmer has been diagnosed by such reputable medical organizations and their specialized physicians as the Mayo Clinic, Northwestern University Medical, and the DeKalb Clinic.

Petitioner is diagnosed as hypertensive, with atrial disease, arrhythmia, severe obstructive and central system sleep apnea, peripheral neuropathy, and glucose intolerance—diabetes mellitus. Each qualify as a handicap under the provisions of the Rehabilitation Act of 1973. Each is sufficient to meet total disability criteria without the toxic exposures and consequent severe chemical susceptibility disorder that he charges defendants also caused. Further exposure would increase the above symptoms and reactions, many of which have a hypoxic component.

Both Petitioners Frank L and Joan P Whitmer are "*handicapped persons*" as defined by the Rehabilitation Act of 1973, 29 USC 794, § 706(8)(B) and are entitled to the protections of that Act.

This Court can also take judicial notice that people, such as this petitioner, Frank L Whitmer, with cardiovascular and respiratory conditions are one of the specially protected classes under all of the Federal, State of Illinois, and City of Chicago pollution standards. They are advised to avoid any exposures exceeding the protective minimums.

Therefore, under the special venue provisions Petitioner sought a reasonable, and healthful litigation environment and filed his suit in the Western Division, as was his right.

Forced Back Into Same Environment
Physicians And His Disability Stated He Should Avoid

Petitioners now live in the Western Division. The venue provisions of RICO provide for venue against any person in any district in which he resides, is found, has an agent, or transacts his affairs. After considerable effort by the Petitioners, the Court and the defendants conceded that venue was proper in the Western Division. But defendants continued their efforts to transfer venue from Western to Eastern Division for their *"convenience."*

No Emergency Health Or Venue Discovery Allowed

Contrary to the Seventh Circuit's and district judge's statements, each court had refused Petitioner any discovery, stating, for example, that they would rule on venue, and nothing else or there would be no discovery except on those defendants who had joined issue. Petitioner's interrogatories and discovery motions had just sat idly. Whenever Mr or Mrs Whitmer asked for information concerning their exposures on the demand of their physicians, all such information was denied to them by the defendants.

Defendants' False Statements Should Require Sanctions.

In refusing to rule on anything except venue, defendants' tainted pleadings were accepted, despite plaintiffs' objections.

For example, defendants falsely claimed that petitioner and his wife were the only two people in the building claiming injury. But defendants knew all along of another personal injury case, 86 L 12567, *Joyce Warner v John Hancock Mutual Life Insurance Company*, et al. They had been served with summons and their attorneys had withdrawn the entire court file in that case. They intentionally lied and the courts didn't seem to care to enforce the rules against false pleading.

It appears that Ms Warner received over a one-hundred thousand dollar settlement, her attorney using plaintiff Frank L

Whitmer's complaint, almost in total. Her major physician is a physician that defendants claim is incompetent and unscientific. The difference, of course, is that Frank L Whitmer is a whistleblower and chairman of the engineering committee for the condominium that insists that the building be corrected and hasn't even been granted the protections of the Racketeering and Corrupt Organizations Act in which Congress provided that he be treated a private attorney general to combat such corruption and fraud.

Transfer To The Eastern Division

On October 2, 1989 the case was ordered transferred to the Eastern Division of the Northern District of Illinois, (Chicago, Illinois) for the *"convenience"* of the defendants, under 28 USC § 1404(a). The judge claimed *"de minimus (sic) inconvenience and hardship to plaintiffs."* (October 12, 1989 Memorandum Opinion and Order, page 7.)

Ignoring And Suppressing Of Petitioners' Uncontroverted Medical Support

His elaborate and inaccurate order never mentioned any of the missing medical documents, petitioner Frank L Whitmer's total disability, or plaintiffs' handicaps.

Without any controverting affidavits from the defendants, Judge Roszkowski and the magistrate unconstitutionally ignored the some twenty-seven affidavits, letters, and reports from Petitioner's five main physicians, other professionals and the Mayo Clinic.

That the uncontroverted medical affidavits and documentation provided the district court and that the injury to Frank L Whitmer's health, physical, financial and emotional state would be construed as *"very small, trifling or insignificant"* is highly prejudicial, and a total violation of Petitioners' constitutional rights to due process, equal protection, access to the courts . . . and most important, their right to life, liberty and health.

Denied Leave To File

There could be no hearings, evidentiary or otherwise for Petitioner Frank L Whitmer was denied leave to file anything more, without any cause or reason. (July 18, 1989 order, WD 284)

DEFENDANTS AGAIN POISON PLAINTIFF-APPELLANT FRANK L WHITMER IN THEIR JOHN HANCOCK CENTER BUILDING.

The Chicago municipal housing court finally ordered certain corrections. Defendants entered into agreed orders with the City to make some changes in the monitoring and presumably the operation of the building to alleviate the pollution. The lead attorney for John Hancock described the new garage carbon monoxide monitoring equipment as follows:

"monitors will be in use from the alarm . . . thirty-five parts per million When the alarm sounds . . . the fans will then be turned on and the experience is the fans will quickly bring the level down to just a few parts per million."

Actual experience by Petitioner on May 17, 1989 proved that this system was either incompetent, intentionally disabled, inoperative, or malfunctioning that evening. Petitioner was dangerously and illegally exposed to non-automotive garage fumes and carbon monoxide levels violating all health standards in the indoor enclosed John Hancock Center public garage. The readings were taken and recorded by the Certified Industrial Hygienist doing the physical sampling and are part of the record. *Petitioner Frank L Whitmer was exposed to combustion fumes with levels of carbon monoxide as high as 65, 82, 141, 45, 50, 59, and 75 parts per million as has been fully documented for the Federal District Court.* (WD 276, Woodring affidavit)

Almost every one of these readings violated the mandatory minimum requirements of the City of Chicago ventilation Code 13-176-300 setting a standard that *"shall not exceed 50 parts per million of air."*

These unlawful exposures again devastated plaintiff Frank L Whitmer's health.

Petitioner's request for time to recover was denied by the court. He was not only totally disabled, but had become legally disabled.

He had been transferred back into the very environment he escaped from years ago to protect his health, and that his total disability adjudication stated he should not be exposed to.

Petitioners Extremely Diligent

In spite of all this, Petitioners have been extremely diligent while ill, and handicapped, only asking that they be given meaningful due process.

A THREE MONTH DELAY TO HEAR
AN EMERGENCY HEALTH MOTION

United States District Court, Eastern Division

Three Month Delay To Hear Emergency Health Motion

On **March 12, 1990** the court was asked to stay the proceedings so that out-of-state medical evaluation and treatment could be scheduled for serious and disabling, cardiac, neurological and respiratory problems. The major presenting problems and risks were cardiovascular and respiratory, with the Mayo Clinic stressing that Petitioner's sleep apnea therapy must be reevaluated.

Petitioners also requested that personal presentation of the motion not be required, for the health reasons described in the motion, and that ruling be by mail.

Judge Nicholas J Bua had before him uncontroverted medical affidavits, letters and reports confirming why Mr Whitmer

needed a critical immediate reassessment of his very severe sleep apnea, and that could only be done successfully in a fully equipped sleep disorders center. Mr Whitmer's health had continued to deteriorate without the proper specialized medical care asked for in the past.

Instead of acting promptly as an emergency, a briefing schedule was set, ordering the defendants to file their answers by March 30, 1990 and Petitioners to file replies in support of their motion on April 10th, 1990.

Assigned To Magistrate

Judge Nicholas J Bua referred all pending motions to Magistrate W T Rosemond Jr. On **June 4, 1990**, three months after the original motion for emergency health care, a status hearing was set for June 12, 1990.

This date conflicted with Petitioners filing of their petition for certiorari with the Supreme Court of the United States, due June 15. They badly needed the time to do legal research and finish their thirty page petition.

Petitioners filed emergency objections to the conflicting date and requested a ruling on their pending health motion for a stay of proceedings, stressing:

"Plaintiff's serious health emergency had also been clearly and objectively documented with affidavits and previously provided to this Court."

Petitioners' motion for a change of date was denied. On June 12, 1990 the magistrate's constant theme and emphasis were — *"the case has got to move."* He declared that Petitioners' requests for time for medical care were *"moot."*

All relief was denied. Nineteen orders were entered. Petitioners were ordered to respond to 250 pages of twelve motions to dismiss and for summary judgment, to obtain any necessary discovery and to complete all medical treatment within ninety days.

Petitioners were plunged into a full briefing schedule, with no relief for Mr Whitmer's still unresolved medical problems - which were the reason for his original March 12, 1990 motion. Again his long neglected, and increasing medical problems were ignored, and the court insisted that the case progress regardless of the consequences to the Petitioners.
Petitioners had to divert crucial time from their June 15, 1990 Petition for Writ of Certiorari in order to object to the conflicting hearing, prepare a full motion, then prepare for the hearing, attend the two hour telephonic hearing, followed by preparing objections to the magistrate's decisions. These demands added to Petitioner's already precarious ill health were the added straws that apparently finally broke him.
Mr Whitmer finally collapsed physically on June 15, 1990 and was fevered, confused, and exhausted after working through two nights and two days (even though feeling increasingly ill for months), to partially finish the Petition for Writ of Certiorari to the United States Supreme Court.

Petitioners' moved for time to object to the magistrate's 19 orders, supported by his physician's affidavit and a radiologist's report.

PLAINTIFF FRANK L WHITMER PHYSICALLY COLLAPSES AND THE CASE IS DISMISSED WHEN HE CAN NOT APPEAR

June 26, 1990 at a status hearing before Judge Nicholas J Bua:

> The Court: *Do you know where the plaintiff is?*
> Mr Marr: . . . *I don't. We were before Magistrate Rosemond approximately 14 days ago, and that status hearing was held with a speaker phone with Mr Whitmer on it and the attorneys in the magistrate's courtroom.*

Despite the magistrate's full briefing schedule set fourteen days earlier, the case was dismissed for want of prosecution as

Petitioners were not present for this status hearing. *"Order cause dismissed for want of prosecution."* This dismissal was sua sponte, not on the defendants' motion.

PLAINTIFF FRANK L WHITMER BARELY SURVIVES SIX MONTHS OF UNRELIEVED MULTIPLE LIFE THREATENING ABDOMINAL PERFORATIONS.

On June 30, 1990, Mr Whitmer's physicians determined the presence of a distal antral pyloric ulcer, probably penetrating type.

Physician, Board Certified Internist, and Cardiologist William K Lee stated to the Federal District Court by his July 6, 1990 affidavit:

> *"In the past weeks he has developed a febrile illness in which no infectious disease process can be found. He has lost 24 lbs in addition to developing a significant amount of gastrointestinal symptoms with nausea, anorexia, dyspepsia and epigastric discomfort . . . and a distal antral pyloric ulcer. He requires further evaluation including gastroscopy to evaluate the pyloric ulcer to make sure there is no other disease processes in addition to an ERCP to evaluate his gallstones. . . . he is not a good candidate for any type of anesthesia or sedation which will be required for any endoscopy and/or surgery . . ."*
>
> *"I strongly advise that he get an immediate evaluation . . . at the Mayo Clinic . . . Any further delay will have a catastrophic impact on his immediate and future health."*

Petitioner was advised by his physicians that he was in danger of perforating unless attended to immediately. His physicians told him to go to the Mayo Clinic immediately for emergency health evaluations — that every day delayed risked his life.

These denials of a stay delayed Petitioner's emergency health treatment for almost seven months. He finally obtained a stay, and was able to go as an emergency patient to the *Mayo Clinic*, not because of his health emergency — *but only because he had filed a Petition for Writ of Certiorari to the United States Supreme Court!*

This denial of Petitioners' constitutional rights, as well as his inalienable rights to life itself, by the lower courts, was the very reason for that Petition for Writ of Certiorari to the United States Supreme Court and for his appeal to the United States Court of Appeals for the Seventh Circuit.

If proper and timely medical care and reassessment had been granted, Petitioner Frank L Whitmer's health problems could have been corrected or sufficiently reduced to cease being a problem. Instead it became a growing and deadly problem that Petitioners and their physicians could not correct without the court's help.

United States Court Of Appeals For The Seventh Circuit

Petitioners appealed (90-2888) the unexpected, unwarranted dismissal of June 26, 1990 and all prior orders.

September 7, 1990. Petitioners sought time in the United States Court of Appeals for a 45 day medical emergency. Mr Whitmer's physicians estimated it would take at least 45 days for the emergency medical care and nominal recovery. But the Court added to Petitioners' burden by ordering that their brief and short appendix be filed at the end of the 45 days. That left no time for the medical emergency.

Another life-threatening abdominal perforation took place late September, 1990. All of the medical estimates and medical treatments had to be revised and substantially increased. It was as his physicians feared. Further emergency diagnostic testing at the Mayo Clinic October 6, 1990, found that the lack of timely necessary care had compounded the health crisis to where the Mayo Clinic had to advise *emergency exploratory*

and corrective surgery for his gastrointestinal perforations. Petitioner again was required to request time, based on the estimates of his physicians.

October 23, 1990. At this point Petitioner had continued to perforate for over four months, from at least June 15, 1990. Add to this the time delay in the federal district court — seven months had passed since his original March 12, 1990 request.

On **October 25, 1990**. The Court of Appeals denied his physicians' request for at least 90 days for complicated emergency exploratory and corrective surgery for a continuing perforation condition. The court granted only 49 days to have surgery, recuperate, do legal research, and preparation of the brief, appendix and reply brief, leaving only a few days for the major surgery and an anticipated difficult recovery.

On **November 27, 1990** Petitioner had another life-threatening abdominal perforation. His glucose level elevated again.

December 14, 1990 motion.[1] Mr Whitmer was again forced to ask the court for time because of the November 27, 1990 medical determination that he was still perforating dangerously with a growing risk of infection.

January 7, 1991. Petitioners filed the eight page sworn medical affidavit of William K Lee in further support of their motion for a stay.

The Mayo Clinic's recent instructions include such strong terms as 'surgical exploration,' life threatening,' 'progressive infection,' 'or impossible to treat successfully if further delayed,' and *'imprudent to delay.'*

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1 Petitioner's Emergency Motion for Stay of Proceedings and/or Time Extension to Obtain Petition for Certiorari and to Seek Emergency Medical Care" filed December 17, 1990.

A LIFE-TIME APPOINTEE UNITED STATES CIRCUIT JUDGE IGNORES AND RIDICULES PLAINTIFF-APPELLANT FRANK L WHITMER'S FIGHT FOR LIFE TO SURVIVE THE RESULTING AND DEADLY LIFE-THREATENING PERFORATIONS.

January 25, 1991 Order. Instead of prompt court action, thirty-nine days later Judge William J Bauer of the United States Court of Appeals for the Seventh Circuit ordered:

"While this court is sympathetic to appellant's medical concerns, the prolific filings presented to this court demonstrate that appellants are, in fact, capable of filing a brief. Accordingly, the appellants' brief shall be due on or before February 25, 1991. Failure to file the brief will result in this appeal being dismissed."

Plaintiff Frank L Whitmer never asked Judge Bauer for his sympathy. He asked for time to save his life. He had already proven that he could work somewhat successfully while being assaulted. Judge Bauer is in violation of his oath to uphold the constitution of the United States and to protect plaintiff-appellant Frank L Whitmer's right to life.

All other relief sought was denied, including plaintiffs *"Emergency Motion to Sanction and Strike the responses, to object, and for other relief."*

Petitioners' emergency motion for emergency exploratory and corrective surgery with recuperation time was denied, in spite of it being requested by the Mayo Clinic and supported by his local physician's affidavits.

After delaying immediate action on his motion, from December 17, 1990 to January 25, 1991, no time was provided for his emergency medical needs, with the court of appeals claiming a *de facto* time extension had been granted.

De facto, past, unknown extensions don't help someone who needs extensive exploratory and corrective surgery where each inch of his intestines has to be carefully inspected for damage.

In other words, Judge Bauer prevented plaintiff-appellant Frank L Whitmer from sheduling his emergency exploratory and corrective surgery with recuperation, until after he would file his reply brief three months later (if of course, if he lived).

CONCLUSION

Petitioners respectfully ask that the Court to issue a writ of certiorari to the Court of Appeals for the Seventh Circuit, remanding the case for a full briefing on the merits.

Power of supervision
United States Supreme Court Rule 10(a) states:

"(a) When a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Petitioners ask this Court to exercise its power of supervision. They started the certiorari process with their petition for writ of certiorari 89-1984.

Alternatively, the Court should reverse summarily and remand with supervision to the court below, and require the district court to proceed in accordance with the law, for full hearing on the merits of the complaint with a proper case and trial.

This Court should dispose of this matter as law and justice require.

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf
221 Pardridge Place, DeKalb IL 60115
815/758-7272

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted December 14, 1992*
December 16, 1992

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 91-2805

FRANK L. WHITMER	]	
and JOAN P. WHITMER,	]	
Plaintiffs-Appellants	]	
v	]	
JOHN HANCOCK	]	
MUTUAL LIFE	]	
INSURANCE COMPANY,	]	No. 89 C 8341
SKIDMORE, OWINGS &	]	Judge Nicholas J Bua
MERRILL and SUDLER &	]	
COMPANY, et al,	]	
Defendants-Appellees	]	

ORDER

Frank and Joan Whitmer believe that conditions in the John Hancock Center, where they formerly lived in a condominium, made them seriously ill. Seeking to recover from a number of defendants under federal and state law, they filed suit in the district court. After much procedural

wrangling the case came up for a status hearing on June 26, 1990. Neither of the pro se plaintiffs appeared at this hearing, and the judge dismissed their case for lack of prosecution. The plaintiffs' motion for relief from this order under Fed. R. Civ. P. 60(b) was denied. They appeal that decision, and we affirm.1

We review the denial of a Rule 60(b) motion for an abuse of discretion. *Del Carmen v Emerson Elec. Co.*, 908 F.2d 158, 161 (7th Cir. 1990). The plaintiffs claim that the district court abused its discretion because their failure to appear at the status hearing arose from mistake or excusable neglect. Fed. R. Civ. P. 60(b)(1).2 Their excuse is that they had participated in a status hearing with a magistrate judge just two weeks earlier, and believed that since matters were before the magistrate all hearings before Judge Bua had been suspended. The defendants, in turn, argue in favor of the decision by noting that Joan Whitmer was in the courthouse on the day of the hearing but nevertheless neglected to attend. They also point out that the scheduled hearing before Judge Bua had never been officially cancelled, so the plaintiffs had no good reason to skip it. Finally, they refer to the procedural history of the case, which is filled with plaintiffs' motions for extensions of time, failure to respond to defendants' motions, and failure to comply with discovery orders.

"[A]buse of discretion in denying a Rule 60(b) motion is established only when no reasonable person could agree with the district court." *Lech v St. Luke's Samaritan Hospital*, 921 F.2d 714 (7th Cir. 1991). A reasonable person could

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1 An earlier appeal from the dismissal order itself was dismissed by this court for lack of prosecution when, instead of filing a brief, the plaintiffs filed a series of motions for extensions of time and to abate briefing. Plaintiffs' App., ex. T.

2 The motion raised all of the grounds listed in Rule 60(b), but mistake and excusable neglect are the only ones pursued on appeal.

certainly agree with the court here. From one point of view, of course, it might seem that the plaintiffs' neglect was excusable; this was the first time they had missed a conference, yet the court dismissed their case without finding out where they were or imposing a warning or some lesser sanction. If that were the whole story, then the court might have abused its discretion in dismissing this pro se case and denying the Rule 60(b) motion. See *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988) ("[I]n the absence of notice that dismissal is contemplated a district court should impose a penalty short of dismissal unless the derelict party has engaged in *'bad faith or contumacious conduct.'*"); *Schilling v Walworth County Park & Planning Comm'n*, 805 F.2d 272 (7th Cir. 1986) (error to dismiss pro se case for failure to appear at conference where no warning had been given, case was young, and there was no record of delay or contumacious conduct); *Camps v. C & P Telephone Co.*, 692 F.2d 120 (D.C. Cir. 1981) (error to dismiss pro se case for litigant's appearing late at hearing where no warnings given and this was plaintiffs' first act of misconduct); *Holt v. Pitts*, 619 F.2d 558, 560-63 (6th Cir. 1980) (error to dismiss where incarceration prevented pro se plaintiff from attending hearing); *Navarro v Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 218 (8th Cir. 1975) (error to dismiss pro se case without some record of delay or contumacious conduct); *Meeker v. Rizley*, 324 F.2d 269, 271 (10th Cir. 1963) (error to dismiss pro se case for innocent failure to appear at initial pre-trial conference).

But district courts are not required to fire warning shots before dismissing. *Lockhart v. Sullivan*, 925 F.2d 214 (7th Cir. 1991). And more important, the plaintiffs' failure to appear was not their first misconduct, making their neglect less excusable. When reviewing a district court's exercise of discretion, we examine both *"the procedural history of the case and the situation at the time of dismissal."* *Daniels v.*

Brennan, 887 F.2d 783, 786 (7th Cir 1989). Throughout this litigation the Whitmers have asked for some thirty extensions of time or stays, neglected to respond to the defendants' motion to dismiss despite the court's setting several briefing schedules, and belligerently refused to comply with discovery orders. We are aware that Mr. Whitmer has been ill during this litigation and required a good deal of treatment, which explains some of the extension motions, as does the fact that the plaintiffs have been simultaneously litigating other claims in state court. Nevertheless, we cannot say that the district court abused its discretion in denying their Rule 60(b) motion. In well over two years this litigation has moved like a glacier, thanks to the Whitmers' constant requests for more time and refusal to cooperate with either the defendants or the court. This occurred despite numerous attempts to accommodate the plaintiffs' situation by giving them second and third chances to comply with court directives. They have not been inattentive, but they have stonewalled to such an extend that after thirty months it is still hard to judge the merits of their claims, because the facts have not been fleshed out and they have yet to respond to the aging motion to dismiss. Thus, even if missing the status hearing was the result of excusable neglect, there is no justification for all of the other acts leading up to the dismissal. *Cf. Lockhart*, 925 F.2d at 218-19 (dismissal proper where plaintiff missed status hearing and refused to cooperate in discovery); *Anderson v. United Parcel Service*, 915 F.2d 313, 315 (7th Cir. 1990) (series of dilatory tactics, including failure to cooperate in discovery); *Daniels*, 887 F.2d at 786 (plaintiff missed status conferences and failed to submit a pretrial order despite court's warnings); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1178 (7th Cir. 1987) (plaintiff produced inadequate discovery responses and failed to comply with formal court order); *3 Penny Theater Corp. v Plitt Theatres, Inc.*, 812 F.2d 337, 340 (7th Cir.

1987) (failure to attend status hearings or cooperate in discovery).

Perhaps the better course would have been to impose a minor sanction or somehow warn the Whitmers that they were on thin ice, but our job is not to second-guess the district court. Its decision fell within the bounds of sound discretion, and is therefore AFFIRMED.

* After preliminary examination of the brief, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). Plaintiffs-Appellants have filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Date: February 9, 1993

BEFORE:
Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

NO. 91-2805

FRANK L. WHITMER AND and JOAN P. WHITMER,
Plaintiffs-Appellants

v

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SKIDMORE, OWINGS & MERRILL and SUDLER & COMPANY, et al,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 C 8341, Judge Nicholas J Bua

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed by plaintiffs on January 26, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 7, 1991

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for consideration of the following documents:

1. "APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO THE WHITMER'S MOTION FOR SANCTIONS" filed herein on June 4, 1991, by counsel for Appellee Skidmore, Owings & Merrill.

2. "PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR

REHEARING IN BANC" filed herein on May 24, 1991, by the pro se appellants.

On consideration thereof,

IT IS ORDERED that APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO WHITMERS' MOTION FOR SANCTIONS is DENIED.

IT IS FURTHER ORDERED that appellants' Petition for Rehearing is DENIED. The court further reiterates that, to date, appellants have made no attempt to file a brief on appeal despite the numerous other filings they have offered. The Clerk of Court is directed to return, unfiled, all further pleadings offered by appellants in this appeal.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 10, 1991

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "APPELLANTS' EMERGENCY MOTION TO PLACE BRIEFING IN ABEYANCE PENDING RESOLUTION OF THE DISTRICT COURT'S ORDER PROCEEDING TO A MEMORANDUM OF ITS FRCP 60(b) INCLINATION" filed herein on May 6, 1991, by the pro se appellants. On consideration thereof,

IT IS ORDERED that the motion is DENIED.

On April 25, 1991, we ordered appellants to file their opening brief by May 3, 1991, or face dismissal of their appeal for want of prosecution. Since that order, appellants have filed two emergency motions to abate briefing; however, they have chosen not to file a brief. The brief in this case was originally due in October 1990. We have granted several extensions of time, none of which have produced a brief. Accordingly, this appeal is DISMISSED FOR WANT OF PROSECUTION.

United States Court of Appeals cg

For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1991

Before Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "EMERGENCY MOTION to VACATE OR MODIFY PORTIONS OF APRIL 25, 1991 ORDER and for a FRCP 60(b) 'BRIEF POSTPONEMENT' UNDER THIS CIRCUIT'S 'ESTABLISHED PROCEDURES'" filed herein on April 30, 1991, by pro se appellants, Joan and Frank Whitmer. On consideration thereof,

IT IS ORDERED that said motion is DENIED. The opening brief of the appellants is due on May 3, 1991 as previously ordered. Failure to file a brief by that date will result in the dismissal of this appeal for failure to prosecute.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1991
[1 of 2 orders this date]

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

No. 90-2888		
FRANK L. WHITMER, et al., Plaintiffs-Appellants	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING" filed herein on March 29, 1991, by the pro se plaintiffs-appellants. On consideration thereof,

IT IS ORDERED that PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING is GRANTED, our order of

March 15, 1991 is VACATED and this appeal is REINSTATED. The district court's order of June 26, 1990 dismissing appellants' complaint for want of prosecution was an appealable order. The motion to vacate that order, because it was filed more than ten days after the dismissal, was a motion under Federal Rule of Civil Procedure 60(b), and therefore, did not suspend the finality of the June 26th order. See Federal Rule of Appellate Procedure 4(a)(4).

However, our reinstatement of this appeal raises a secondary question as to whether this appeal should be dismissed for want of prosecution under Circuit Rule 31(c)(2). Although the court placed briefing in abeyance upon the filing of the motion to dismiss, see order of February 8, 1991, we had previously warned appellants in our order of January 25, 1991, that this case would be dismissed for failure to prosecute if appellants did not file their brief pursuant to that order. Accordingly,

IT IS FURTHER ORDERED that appellants file their opening brief and short appendix by May 3, 1991. Failure to so file will result in the dismissal of this case pursuant to Circuit Rule 31(c)(2).

United States Court of Appeals cg

For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1991
[2nd of 2 orders this date]

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

FRANK L. WHITMER and JOAN P. WHITMER, Plaintiffs-Appellants	]	Appeal from the United States District Court Northern District of Illinois, Eastern Division:
No. 90-2888 v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees	]	No. 89 C 8341 Judge: Nicholas J Bua District Court Judge

This matter comes before the court for its consideration of the " MOTION TO STAY OR DELAY PROCEEDINGS, ACTION OR DUE DATES UNTIL AFTER FILING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, DUE ON MAY 3, 1991" filed herein by the pro se appellant (sic) Frank and Joan Whitmer. On consideration thereof,

IT IS ORDERED that said motion is DENIED. As previously ordered, the opening brief and appendix of the appellants is due by May 3, 1991.

United States Court of Appeals bj

For the Seventh Circuit
Chicago, Illinois 60604

March 15, 1991

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK. H. EASTERBROOK, Circuit Judge
Hon DANIEL A. MANION, Circuit Judge

FRANK L. WHITMER and JOAN P. WHITMER, Plaintiffs-Appellants	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 90-2888 v	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SKIDMORE, OWINGS & MERRILL and SUDLER & COMPANY, et al, Defendants-Appellees	]	No. 89 C 8341 Judge Nicholas J. Bua

This matter comes before the court for its consideration of the:

1. "APPELLEE SKIDMORE, OWINGS & MERRILL'S CIRCUIT RULE 3(c) SUPPLEMENTAL JURISDICTIONAL STATEMENT AND MOTION

TO DISMISS" filed herein on February 8, 1991, by counsel for the Defendants-Appellees.

2. "SUPPLEMENTAL JURISDICTIONAL STATEMENT AND MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION" filed herein on February 12, 1991, by counsel for the Defendants-Appellees.

3. "PLAINTIFFS-APPELLANTS' MOTION FOR CONSOLIDATED RESPONSE to DEFENDANTS-APPELLEES' JURISDICTIONAL STATEMENTS AND RELATED MOTIONS" filed herein on February 15, 1991, for pro se, Appellants. On consideration thereof,

Appellants' motion to reinstate this case is still pending in the district court. Therefore, the district court's order dismissing the case is not yet final and appealable. *Rosner* (sic) *v. Chrysler Corp.*, 869 F.2d 1299, 1304-05 (7th Cir. 1988). Accordingly,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1991

Before
Hon. WILLIAM J. BAUER, Chief Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants	)	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
vs.	)	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees	)	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the following documents:

1. "EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION TO OBTAIN PETITION FOR CERTIORARI AND TO SEEK EMERGENCY MEDICAL CARE" filed herein on December 17, 1990, by pro se appellants.

2. "RESPONSE OF JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND SUDLER

MARLING, INC., TO PLAINTIFFS-APPELLANTS' THIRD 'EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION [ETC.]" filed herein on January 2, 1991, by counsel for the appellees.

3. "MOTION OF THE DEFENDANT-APPELLEE, 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION TO ADOPT THE RESPONSE OF JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND SUDLER MARLING, INC., TO PLAINTIFFS-APPELLANTS' THIRD 'EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION [ETC.]" filed herein on January 2, 1991, by counsel for the appellee.

4. "APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR STAY OF PROCEEDINGS" filed herein on January 2, 1991, by counsel for the appellee.

5. "DEFENDANT WILSON & MCILVAINE'S RESPONSE TO PLAINTIFFS' REQUEST FOR A STAY" filed herein on January 2, 1991 by counsel for the appellee.

6. "MOTION" filed herein on January 2, 1991 by counsel for General Parking Corporation.

7. "SUPPLEMENTAL EMERGENCY MOTION AND AFFIDAVIT FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION

1. TO SEEK EMERGENCY MEDICAL CARE
2. OBTAIN PETITION FOR CERTIORARI" filed herein on January 7, 1991 by appellants.

8. "EMERGENCY MOTION REQUESTING COURT HOLD RULING AND IN BANC REQUEST" filed herein on January 14, 1991, by pro se appellants.

9. "EMERGENCY MOTION TO SANCTION AND STRIKE DEFENDANTS-APPELLEE'S RESPONSES TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION (Filed December 14, 1990) TO OBJECT and for other relief" filed herein on January 23, 1991, by pro se appellants.

Appellants' brief was originally due October 10, 1990. However, this court has twice granted extensions totalling seventy-four days. In addition, this court has allowed appellant to supplement the current motion for extension of time resulting in another de facto extension of one month. While this court is sympathetic to appellant's medical concerns, the prolific filings presented to this court demonstrate that appellants are, in fact, capable of filing a brief. Accordingly, the appellants' brief shall be due on or before February 25, 1991. Failure to file the brief will result in this appeal being dismissed.

IT IS ORDERED that the brief of the appellees will be due by March 27, 1991, and the reply brief of the appellants, if any will be due by April 10, 1991.

IT IS FURTHER ORDERED that all other requested relief is hereby DENIED.

United States Court of Appeals MB

For the Seventh Circuit
Chicago, Illinois 60604

By the Court: December 20, 1990

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

NOTICE TO RESPOND

TO: All Counsel for the Appellees

A RESPONSE AND ORIGINAL AND THREE COPIES, WITH PROOF OF SERVICE) IS REQUIRED ON OR BEFORE January 2, 1991.

TO: "EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION TO OBTAIN PETITION FOR CERTIORARI and TO SEE (sic) EMERGENCY MEDICAL CARE" filed herein on December 17, 1990, by the pro se appellants.

Minute Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Nicholas J Bua
Case Number 89 C 8341 June 26, 1990

FRANK WHITMER v. JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

[Other docket entry:]

Cause called for status hearing. Plaintiffs failed to appear. Order cause dismissed for want of prosecution.

Docketing to mail notices.
courtroom deputy's initials: fda'
number of notices: 14 & MF
date docketed: June 27, 1990
docketing dpty initials: LG
date mld notices: June 27, 1990
mailing dpty initials: LG
document ED 70

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Docket entries: June 14-15, 1990 orders.
Magistrate W Thomas Rosemond Jr.
89C-8341. *Whitmer v Hancock et al.*]

06/14/90 docket ED 51 Minute order of 06/12/90: All stays entered in this case are hereby lifted. Rosemond, M. Mailed notice 06/14/90. KS

06/14/90 52 Minute order of 06/12/90: Status hearing on all pending motions held. Rosemond, M. Mailed notice 06/14/90. KS

06/14/90 docket ED 53 Minute order of 06/12/90: All defendants against whom the plaintiffs have filed a motion to compel must file their responses to the motion by July 16, 1990. Plaintiffs must file their reply brief by September 24, 1990. Rosemond, M. Mailed notice 6/14/90 KS

06/15/90 docket ED 54 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant John Hancock's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 55 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant R. B. Haywood (sic) Company's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 56 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Tishman Construction Company's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 57 Minute order of 06/12/90. Over defendant's objections, plaintiffs are permitted to file a written response to defendant Wilson & McIlvaine's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 58 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Aluminum Company of America's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 59 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Admiral Heating & Ventilating's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 60 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a

written response to defendant Cupples Products Corp. et al's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 61 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant H. S Nachman & Associates et al motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90.

06/15/90 docket ED 62 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant General Parking Corporation's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 63 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Skidmore, Owings & Merrill's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 64 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant City of Chicago's motion to dismiss and memorandum of law in support thereof by

September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 65 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant 175 E. Delaware Place Homeowners Association's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response breief (sic) will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 66 Minute order of 06/12/90: Over defendant L C Kohlman's objections, plaintiffs are permitted to file a written response to defendant's motion for summary judgment by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that if they fail to file a response brief defendant's motion will be granted. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 67 Minute order of 06/14/90: By telephone, in open court, plaintiff stated that he anticipates filing Rule 11 motions directed at those defendants who have filed motions to dismiss. Any and all Rule 11 motions filed by plaintiffs must be filed as separate motions directed against a specific defendant. Such motions may be filed concurrently with plaintiff's response to a particular motion to dismiss on or before Septemberr (sic) 24, 1990. Rosemond, M. Mailed notice 06/15/90. PG

06/15/90 docket ED 68 Minute order of 06/14/90: Regarding those defendants who have filed motions to dismiss accompanied by memorandum of law and who did not appear at the June 12, 1990, (sic), plaintiffs must file a response to these briefed motions to dismiss by September

24, 1990. Reply briefs due by October 29th, Rosemond, M. Mailed notice 06/15/90. PG.

06/15/90 docket ED 69 Minute order of 06/14/90: By telephone, in open court, plaintiff stated that he needed discovery to respond to L. C. Kohlman's summary judgment motion. Plaintiff may not file a discovery request in lieu of a response to L. C. Kohlman's summary judgment motion. See reverse side for more details. Rosemond, M. Mailed notice 06/15/90. PG.

Reverse side of minute order states:

Plaintiffs must file a Response to L. C. Kohlman's summary judgment motion by September 24, 1990. Additionally, plaintiffs may file a motion for discovery stating what discovery they believe necessary to adequately respond to Kohlman's summary judgment motion, and why such discovery is necessary. In any event, plaintiffs must respond to Kohlman's motion to the best of their ability. Plaintiffs are hereby warned that if they fail to file a Response to Kohlman's summary judgment motion, the motion will be granted.

So Ordered. Dated: (blank) /s/ W. Thomas Rosemond, Jr. United States Magistrate.

(2)

No. 92-1808

Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,
Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES P. DENARDO
Counsel of Record
RICHARD J. RETTBERG
CHRISTINE L. OLSON
McKENNA, STORER, ROWE, WHITE & FARRUG
200 N. LaSalle Street, Suite 3000
Chicago, Illinois 60601-1083
(312) 558-3900

Attorneys for JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SUDLER AND COMPANY, n/k/a NATIONAL REAL ESTATE MARKETING, INC., and GENERAL PARKING CORPORATION

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

21 pp

QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a District Court's denial of a Rule 60(b) motion for relief from an order dismissing a case for want of prosecution is not an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect.

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company, Sudler and Company, subsequently known as Sudler Marling, Inc., n/k/a National Real Estate Marketing, Inc., and General Parking Corporation are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

British American Life & General Insurance Berhad

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

British American Life Assurance Company Pte. Ltd. (Singapore)

The Interlife Assurance Company Ltd. (Thailand)

John Hancock International Services Pte. Ltd. (Singapore)

Hancock International Private Equity Management, Ltd. (England)

Dallas Gas & Electric, Inc.

Gulf States Gas Pipeline Company

National Electronic Information Corporation

Polaris Petroleums, Ltd. (Canada)

International Human Resources Development Corporation

Hotel Property Holdings, Inc.

Delmar Petroleum, Inc.

Southwide, Inc.

Holmes Protection Group, Inc.

Sudler and Company, n/k/a National Real Estate Marketing, Inc., and General Parking Corporation state that each has no parent company or subsidiary companies.

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II.

THIS APPEAL DOES NOT INVOLVE ANY ORDERS ENTERED BY THE SEVENTH CIRCUIT OR THE DISTRICT COURT PRIOR TO THE DENIAL OF THE PETITIONERS' RULE 60(b) MOTION 12

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No. 92-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, John Hancock Mutual Life Insurance Company ("John Hancock"), Sudler and Company, n/k/a National Real Estate Marketing, Inc. ("Sudler"), and General Parking Corporation ("General Parking"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Seventh Circuit's two orders in this case. The Court of Appeals' orders: (1) affirmed the District Court's denial of the Petitioners' motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from an order dismissing their case for want of prosecution; and (2) denied the Petitioners' Petition for Rehearing of that prior order.

OPINIONS BELOW

The Court of Appeals issued its order on December 16, 1992 affirming the order of the U.S. District Court, Northern District of Illinois, Eastern Division, dated July 1, 1991, denying the Petitioners' motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Petitioners' Appendix 1-5).

The Court of Appeals issued a second order on February 9, 1993. This Order denied the Petitioners' Petition for Rehearing with Suggestion of Rehearing In Banc of the prior order of December 16, 1992 (Petitioners' Appendix 6).

The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated July 1, 1991, denied the Petitioners' motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b).

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The order of the Court of Appeals was entered on December 16, 1992. Rehearing was denied on February 9, 1993. The Petitioners filed their Petition on May 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 60. Relief From Judgment or Order. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

On August 30, 1977, the Petitioners moved into a condominium on the 85th floor of the John Hancock Center, located in downtown Chicago, Illinois. The Petitioners claimed certain illnesses allegedly arising from "indoor pollution" while residing in the John Hancock Center. The Plaintiffs originally filed their suit on June 10, 1987 in the U.S. District Court, Northern District of Illinois, Western Division (Rockford, Illinois).

On February 3, 1988, the Petitioners filed their first amended complaint. The Petitioners did not issue any summonses in this case until the filing of the first amended complaint, approximately eight months after the filing of the original complaint.

John Hancock and Sudler filed a motion to dismiss and, on April 25, 1988, a memorandum in support as to all counts of the first amended complaint. General Parking filed its motion to dismiss on March 3, 1988 and filed its

memorandum in support on May 10, 1988. Various other Defendants also filed motions to dismiss or motions for summary judgment. The Petitioners never responded to John Hancock, Sudler and General Parking's motions to dismiss and the merits were never addressed. On at least four occasions, the District Court set briefing schedules on these motions to dismiss.

In early 1988, certain Defendants moved for a change of venue and this motion was granted on October 2, 1989, transferring the case to the U.S. District Court for the Northern District of Illinois, Eastern Division.

John Hancock and Sudler served subpoenas for records against the Petitioners' physicians who have provided affidavits for the Petitioners. Soon thereafter, the Petitioners filed a motion to quash subpoena and sent a letter to at least one of the physicians, Dr. Ebbesen, stating that the subpoenas were "improper," "harassing," and were served in "obvious retaliation for your dedicated concern for the health of your patients." After hearing on December 30, 1988, the magistrate in the Western Division denied the motion to quash and required the doctors to produce records from a date certain to the present.

The Petitioners thereafter filed a "Motion to Vacate or Modify or in the Alternative for Rehearing/Reconsideration of Said Ruling," which was subsequently denied by the magistrate. After that ruling, the Petitioners filed another motion disputing the Defendants' rights to the doctors' records. On September 22, 1989, the Defendants filed a motion to compel discovery directed to the subpoenas for the doctors' records. The documents demanded have never been produced from any of the physicians or from the Petitioners. In addition, on three occasions the District Court ordered the Petitioners to respond to the

Defendant City of Chicago's interrogatories and production request. The Petitioners never answered this discovery.

The District Court held a status hearing on January 24, 1990 and ordered that the next status hearing be held on June 26, 1990. Neither Petitioner appeared for the June 26 status hearing although Joan Whitmer was in the courthouse at the time of the status hearing. On June 26, 1990, the District Court, therefore, ordered the cause dismissed for want of prosecution. The Petitioners filed a joint notice of appeal from the dismissal. The Petitioners' appeal was dismissed for want of prosecution by the U.S. Court of Appeals for the Seventh Circuit on May 10, 1991. The Petitioners filed a Petition for Writ of Certiorari from this order, which was docketed in this Court under Case No. 91-756. This Court denied that petition. *Whitmer v. John Hancock Mutual Life Ins. Co.*, ____ U.S. ____, 112 S.Ct. 875 (1992). This Court also denied rehearing. *Whitmer, supra*, ____ U.S. ____, 112 S.Ct. 2001 (1992).

On July 27, 1990, the Petitioners filed an "Emergency Verified Motion for Relief From Order to Vacate and Reinstate Cause," which referred to Federal Rule of Civil Procedure 60(b). The District Court entered a stay on this motion pending resolution of Petitioners' Petition for Writ of Certiorari, this Court's Case No. 89-1984. This Court denied the Petition. *Whitmer v. John Hancock Mutual Life Ins. Co.*, 498 U.S. 822, 111 S.Ct. 72 (1990).

On May 1, 1991, the Petitioners filed a notice of filing and motion for District Court's inclination to grant Rule 60(b) relief. John Hancock, Sudler and General Parking filed an answer to the motion for inclination and a response to the Rule 60(b) motion. The Petitioners filed their reply on June 19, 1991. On July 1, 1991, the District Court

denied the Petitioners' motion for Rule 60(b) relief. On July 17, 1991, the Petitioners filed a motion to reconsider the District Court's denial of their motion and filed an addendum on July 19, 1991. The District Court denied the motion to reconsider on July 24, 1991. On August 1, 1991, the Petitioners filed their notice of appeal.

On December 16, 1992, the U.S. Court of Appeals for the Seventh Circuit issued its order which affirmed the District Court's denial of the Petitioners' motion for Rule 60(b) relief. On January 26, 1993, the Petitioners filed their Petition for Rehearing with Suggestion for Rehearing In Banc. On February 9, 1993, the Seventh Circuit issued an order denying the Petitioners' Petition for Rehearing.

Since filing their original complaint in June of 1987, the Petitioners filed approximately 30 motions for extensions of time or stays in the District Court alone. The Petitioners were granted extensions of time on 12 occasions. In the Seventh Circuit, the Petitioners filed four similar motions in their first appeal (Case No. 89-3241), seven similar motions in their second appeal (Case No. 90-2888), and nine similar motions in their third appeal (Case No. 91-2805). The Petitioners have also filed at least three similar motions with this Court in prior appeals.

B. Issues Presented By The Petitioners Which Are Not Before This Honorable Court.

The Petitioners' "Questions Presented" section of their Petition lists eight questions, only two of which, questions number 5 and 7, are arguably before this Court. The only real issue arising from the U.S. Court of Appeals for the Seventh Circuit's order is whether the Court of Appeals properly affirmed the District Court's denial of the Petitioners' Rule 60(b) motion as not being an abuse of

discretion. All of the other questions presented by the Petitioners are not addressed by the Court of Appeals' order and are not, therefore, before this Court. In addition, questions 1, 2, 3 and 6 are unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners argue innumerable points in their Petition, only one of which is arguably before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issue before this Court, whether the Court of Appeals properly found that the District Court's denial of the Petitioner's motion for relief pursuant to Rule 60(b) was not an abuse of discretion, does not present an issue which involves a conflict in the decisions of the U.S. Courts of Appeals.

I.

THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEALS. THE U.S. COURTS OF APPEALS HAVE CONSISTENTLY HELD THAT A DISTRICT COURT'S DENIAL OF A RULE 60(b) MOTION FOR RELIEF FROM AN ORDER DISMISSING A CASE FOR WANT OF PROSECUTION IS NOT AN ABUSE OF DISCRETION WHERE THE PLAINTIFF HAS FAILED TO SHOW MISTAKE OR EXCUSABLE NEGLECT.

The Seventh Circuit affirmed the District Court's order denying the Petitioners' motion for Rule 60(b) relief and found that the District Court did not abuse its discretion in denying that motion. In its order, the Seventh Circuit

held that the only grounds listed in Rule 60(b) raised by the Petitioners on appeal were mistake and excusable neglect (Petitioners' Appendix 2). The Petitioners have not contested this finding in their Petition. A review of the decisions of the United States Courts of Appeals for the District of Columbia, First, Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits shows that all have affirmed a District Court's denial of a motion for Rule 60(b) relief from a dismissal for want of prosecution as not being an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect. Since there is no conflict among the Courts of Appeals on this issue, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. This Honorable Court should, therefore, deny the Petitioners' Petition for Writ of Certiorari. The particular U.S. Courts of Appeals and their holdings on this issue are as follows:

D.C. Circuit: *Shaeffer v. Warehouse Employees Union, Local No. 730*, 408 F.2d 204, 206-207 (D.C. Cir. 1969), *cert. denied.*, 395 U.S. 934, 89 S.Ct. 1996 (1969) (Court of Appeals affirmed the District Court's denial of plaintiff's Rule 60(b) motion to vacate a dismissal for want of prosecution as not being an abuse of discretion in light of the plaintiff's dilatory conduct).

First Circuit: *Kaercher v. Trustees of Health and Hospitals of City of Boston*, 834 F.2d 31, 34-35 (1st Cir. 1987) (Court of Appeals held that the District Court did not abuse its discretion in denying the plaintiff's Rule 60(b) motion from a dismissal for want of prosecution due to counsel's failure to appear for pre-trial conference, based on the pattern of delay and neglect in the case).

Second Circuit: *Cucurillo v. Schulte, Bruns Schiff Gesellschaft, M.B.H.*, 324 F.2d 234, 235 (2d Cir. 1963) (Court of Appeals affirmed the District Court's denial

of the plaintiffs' Rule 60(b) motion to vacate an order dismissing the case for want of prosecution when the plaintiff had done nothing to prosecute the suit since filing answers to interrogatories).

Fifth Circuit: *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287-289 (5th Cir. 1985) (Court of Appeals treated a motion to reinstate as a Rule 60(b) motion and affirmed the District Court's denial of that motion from an order dismissing the case for want of prosecution due to counsel's failure to appear at a motion conference).

Sixth Circuit: *Buck v. U.S. Department of Agriculture, Farmers Home Admin.*, 960 F.2d 603, 608-609 (6th Cir. 1992) (Court of Appeals affirmed the District Court's denial of plaintiffs' Rule 60(b) motion to set aside an order dismissing the case for want of prosecution due to counsel's failure to comply with a court order as not being an abuse of discretion).

Seventh Circuit: *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 607-609 (7th Cir. 1986) (Court of Appeals found no abuse of discretion in the District Court's refusal to vacate a dismissal under Rule 60(b) due to counsel's failure to respond to a motion to dismiss and attend a pretrial conference).

Eighth Circuit: *Fox v. Brewer*, 620 F.2d 177, 180-181 (8th Cir. 1980) (Court of Appeals treated a motion to reconsider as a Rule 60(b) motion and affirmed the District Court's denial of that motion from a dismissal for want of prosecution due to plaintiff's lack of action for one year as not being an abuse of discretion).

Ninth Circuit: *Whale v. United States*, 792 F.2d 951, 952, 954 (9th Cir. 1986) (Court of Appeals affirmed the District Court's denial of a Rule 60(b) motion from a dismissal for failure to prosecute as not being an abuse of discretion).

Eleventh Circuit: *Garner v. Griffith*, 391 F.2d 934 (11th Cir. 1968) (Court of Appeals affirmed the District Court's denial of the plaintiff's Rule 60(b)(1) motion to vacate an order dismissing the case for want of prosecution as not being an abuse of discretion).

Not only is there no conflict among the U.S. Courts of Appeals on this issue, the Seventh Circuit's decision in the instant case is proper. The Petitioners' Rule 60(b) motion set forth no reasons to justify vacating the District Court's order dismissing their case for want of prosecution for either mistake or excusable neglect. The only "facts" in the Rule 60(b) motion which provide a possible explanation for failure to appear at the status hearing were unsupported. For example, Frank Whitmer alleges that four days after the entry of the dismissal, he was diagnosed as having an ulcer and was under medical care. This allegation was not, however, supported by the exhibits attached to the motion. Furthermore, the Petitioners had no reasonable basis to believe that the June 26th status would not be held since that status date was never vacated. In addition, Joan Whitmer was in the courthouse on the day of the status hearing but did not attend the hearing.

The history of this case also reflects a record of dilatory conduct by the Petitioners, as recognized by the Seventh Circuit. By June 26, 1990, the Petitioners had filed approximately 30 requests for extensions of time or stays in the District Court alone and had been granted continuances on 12 occasions. The Petitioners had also engaged in other dilatory tactics, such as failing to issue summonses for eight months, repeatedly challenging orders regarding subpoenas for records, filing two appeals in the U.S. Court of Appeals for the Seventh Circuit which were dismissed, and filing two Petitions for Writ of Certiorari in this Court which this Court denied.

The Petitioners simply have made no attempt to prosecute this case since the inception of the case. Instead, through an endless series of motions for stay of proceedings, for time enlargement, for sanctions, and for unfounded and trivial appeals, all of the Petitioners' efforts were directed at preventing the District Court and the parties from addressing any issues raised by the complaint. For example, the Petitioners never responded to John Hancock, Sudler and General Parking's motions to dismiss, which were filed and briefed over four years ago. These motions to dismiss were never resolved. It could not be more evident that the Petitioners' efforts were never not directed toward prosecuting their action, but to delaying it.

Finally, many of the facts set forth at pages 15 through 16 of the Petition are simply wrong. All motions to dismiss were filed less than three months after the Petitioners filed their first amended complaint. Regarding the Petitioners' motion for clarification of the trial court record, the Petitioners originally filed this motion in August of 1989 and renewed the motion on October 20, 1989. The District Court judge ruled on this motion within six days. Regarding the time between the order transferring the case to the Eastern Division and the order setting a briefing schedule on the motions to dismiss, the Petitioners requested a stay of proceedings during that time. Regarding the Petitioners' emergency health motion filed in March of 1990, the Petitioners filed at least one subsequent motion for a stay and on June 12, 1990, all stays were lifted. Contrary to the Petitioners' argument, this case was not delayed due to actions by the District Court but due to actions of the Petitioners.

II.

THIS APPEAL DOES NOT INVOLVE ANY ORDERS ENTERED BY THE SEVENTH CIRCUIT OR THE DISTRICT COURT PRIOR TO THE DENIAL OF THE PETITIONERS' RULE 60(b) MOTION.

Throughout their Petition, the Petitioners refer to the proceedings in their prior appeal from the underlying order dismissing their case for want of prosecution, which was docketed under Seventh Circuit Case No. 90-2888. The Petitioners also attach numerous orders from this appeal in the Appendix to their Petition. The issues raised in this prior appeal are irrelevant for two reasons.

First, the Petitioners filed a Petition for the Issuance of a Writ of Certiorari from the prior appeal, which was docketed in this Court under Case No. 91-756. This Court not only denied the Petition, but also denied the Petitioners' Petition for Rehearing. *Whitmer v. John Hancock Mutual Life Ins. Co.*, ____ U.S. ____, 112 S.Ct. 875 (1992), *reh'g denied*, ____ U.S. ____, 112 S.Ct. 2001 (1992). Second, any issues regarding the District Court's order dismissing the Petitioners' case for want of prosecution are not properly before this Court. This Court has held that review of a denial of a Rule 60(b) motion does not raise the underlying judgment for review. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263, 98 S.Ct. 556, 560, fn.7 (1978).

At pages nine through twelve of their Petition, the Petitioners refer to their request made to the District Court for its "inclination" to grant their motion for relief under Rule 60(b). This argument is now moot since the District Court denied the Petitioners' Rule 60(b) motion and the Petitioners are currently seeking review of that order. Furthermore, this issue arose in the Petitioners' prior

appeal and, therefore, has already been ruled on by this Court.

Even if this argument were relevant, the District Court and Seventh Circuit did not follow an improper procedure. There is no requirement under Rule 60(b) that a District Court grant a Rule 60(b) motion, let alone issue a decision indicating its inclination to grant such a motion. A Court of Appeals is also not required to remand an appeal if a Rule 60(b) motion is pending. Instead, the Circuit Courts of Appeals are in agreement that only if a party files a motion under Rule 60(b) while an appeal is pending, and only if the District Court also indicates it will allow the motion, then the Court of Appeals should be requested to remand the cause. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979); *Ryan v. United States Lines Company*, 303 F.2d 430, 434 (2d Cir. 1962); *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 699 (5th Cir. 1955); *Textile Banking Co., Inc. v. Rentschler*, 657 F.2d 844, 849-850 (7th Cir. 1981); *Winter v. Cerro Gordo County Conservation Board*, 925 F.2d-1069, 1073 (8th Cir. 1991); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), *cert. denied*, 429 U.S. 896, 97 S.Ct. 259 (1976); *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965); *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952). In the instant case, the District Court did not indicate its inclination to grant the Petitioners' Rule 60(b) motion while their prior appeal was pending.

CONCLUSION

The only issue before this Honorable Court is whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a District Court's denial of a Rule

60(b) motion for relief from an order dismissing a case for want of prosecution is not an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect. There is no conflict among the U.S. Courts of Appeals on this issue. The issues raised by the Petitioners are without merit. The Petition should be denied forthwith.

Respectfully submitted,

JAMES P. DENARDO
Counsel of Record
RICHARD J. RETTBERG
CHRISTINE L. OLSON
McKENNA, STORER, ROWE,
WHITE & FARRUG
200 N. LaSalle Street, Suite 3000
Chicago, Illinois 60601-1083
(312) 558-3900

Attorneys for JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SUDLER AND COMPANY, n/k/a NATIONAL REAL ESTATE MARKETING, INC., and GENERAL PARKING CORPORATION

(3)

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEONARD S. SHIFFLETT
Counsel of Record
CARRIE A. DURKIN
WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

Attorneys for Respondent
WILSON & MCILVAINE

BEST AVAILABLE COPY

QUESTION FOR REVIEW

Whether there is any basis for the granting of the petition for writ of certiorari where the only issue raised is whether the denial of a Rule 60(b) motion for relief is an abuse of discretion.

LIST OF PARTIES

Wilson & McIlvaine is a partnership, engaged in the practice of law, and as such has no parents, subsidiaries or affiliates.

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No. 92-1808

IN THE

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OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,

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v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure Rule 60.
Relief From Judgment or Order

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE [1]

Procedural Background Of The Litigation

Petitioners were plaintiffs in the district court. On June 26, 1990, petitioners did not appear in court for a scheduled status hearing. The district court dismissed the case for want of prosecution. Petitioners appealed the dismissal to the Seventh Circuit Court of Appeals ("Appellate Court") which subsequently dismissed the appeal.[2] The Supreme Court denied petitioners' Petition for Writ of Certiorari (*Whitmer v. John Hancock Mutual Life Ins. Co.*, ___ U.S. ___, 112 S. Ct. 875 (1992)) and the subsequent petition for rehearing (*Whitmer, supra*, ___ U.S. ___, 112 S. Ct. 2001 (1992)).

On or about July 27, 1990, petitioners filed a motion to vacate the district court dismissal under the Federal Rules of Civil Procedure, Rule 60(b), which motion was denied on July 1, 1991.[3] The petitioners appealed that denial and the Appellate Court affirmed the district court's ruling

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[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history of this action and is replete with allegations that have no basis in the record. The sole issue is procedural and is set forth in its limited parameters in this Statement.

[2] Petitioners moved for numerous extensions of time but failed to file a brief timely despite approximately 8 months of extensions granted by the Appellate Court.

[3] The district court delayed its ruling because the district court had stayed the matter pending resolution of petitioners' earlier petition for writ of certiorari, seeking the review of a district court order transferring the case from the Western Division to the Eastern Division of Illinois. That petition for certiorari was also denied. *Whitmer v. John Hancock*, 498 U.S. 822 (1990).

on December 16, 1992 in an unpublished order. On February 9, 1993, the Appellate Court denied the petition for rehearing and this Petition for Writ of Certiorari ensued.

SUMMARY OF ARGUMENT

The only issue before this Court is whether there exists a special or important reason, such as a conflict among decisions of the circuits, to grant this Petition for Writ of Certiorari. The denial of a Rule 60(b) motion is a matter of discretion and brings up for review only the ruling on the motion and not the underlying judgment. Accordingly, petitioners have not presented an issue which merits this Court's further review.

ARGUMENT

THIS CASE DOES NOT PRESENT THE TYPE OF ISSUE WHICH MERITS THIS COURT'S REVIEW ON WRIT OF CERTIORARI.

Rule 10 of the Supreme Court Rules sets forth the "character of reasons" for which review on writ of certiorari would be indicated. With reference to decisions of a federal court, these reasons include a conflict between circuit court decisions, a conflict between federal court and state court decisions on a federal question, or a clear departure from the usual course of judicial proceedings. No

federal question is properly raised in this appeal.[4] Accordingly, to come within the guidelines of Rule 10, petitioners must demonstrate a conflict between the circuit courts of appeal or a clear departure from accepted law by either the district court or a sanctioning of that departure by an Appellate Court.

Petitioners have not seriously asserted any conflict among the circuits. Petitioners apparently would place their case into the remaining category: that the district court so far departed from the usual course of judicial proceedings as to warrant exercise of this Court's power of supervision. This case clearly does not fall within that character of reason.

This Court has already denied certiorari on the propriety of dismissals by the district court and the Appellate Court, respectively, of the underlying case and its appeal. This Court has refused to review whether those courts properly exercised their discretion. This Court rejected petitioners' contention that the dismissals warranted review on writ of certiorari. Once passage of time from judgment caused Rule 60 to be the sole source of relief in the trial court, petitioners' application for relief was required to meet the additional standards of the Rule.[5]

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[4] The appeal from a denial of a Rule 60(b) motion brings up for review only the ruling on the motion to vacate and not the underlying judgment. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978). Thus, even if the petitioners' claims were somehow construed to have raised a federal question below, that issue is not reviewable in this proceeding.

[5] Petitioners cited all six grounds for relief under Rule 60(b) in their motion to vacate. The Appellate Court premised its ruling on Rule 60(b)(1) because petitioners failed to pursue the others on appeal.

Therefore, relief under Rule 60(b) posed a higher standard for petitioner to meet than appellate review of the original dismissal. The initial review process to affirm the dismissals should dispose of any contention that denial of a Rule 60(b) motion was a "far depart[ure] from the accepted and usual course of judicial proceedings." Supreme Court Rule 10.

Additionally, the district court had a reasonable basis for denial of the motion. The district court was in the best position to observe the manner in which the petitioners conducted the litigation. Petitioners made endless motions for continuances of each due date of briefs. They appeared unwilling to address the substantive issues raised in motions directed to their complaint, instead content to blame the courts and the defendants for their failure to comply with any briefing schedule in the district court. Only after suffering dismissal of an earlier appeal did the petitioners take the Appellate Court's admonitions seriously enough to file a brief, and then, only after motions seeking extentions for the filing. The arguments that petitioners raise in the petition are the same contentions petitioners have used through five years of dilatory motions. The district court had a solid basis to deny the motion and the Appellate Court had sufficient grounds to affirm that denial.

The relevant issue in this case does not raise an important question of federal law or an issue with conflicting decisions in the circuit courts. Any resolution of petitioners' allegations would certainly not contribute to the development of national law. There has been no departure, much less a far departure, from accepted judicial proceedings. Rather, the Court is presented with dissatisfied litigants who have exhausted their avenues for relief through a refusal to comply with court rules and pro-

cedures. The valuable resources of the Supreme Court should not be squandered on further consideration of petitioners' stale arguments.

CONCLUSION

Respondent Wilson & McIlvaine requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEONARD S. SHIFFLETT
Counsel of Record
CARRIE A. DURKIN
WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

Attorneys for Respondent
WILSON & MCILVAINE